

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Modifying the Commission's Process to Avert)	
Harm to U.S. Competition and U.S. Customers)	IB Docket No. 05-254
Caused By Anticompetitive Conduct)	

REPLY COMMENTS OF AT&T CORP.

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SUMMARY

The comments filed in response to the Commission's Notice of Inquiry ("Notice") show strong U.S. international carrier support for improving the Commission's anti-whipsaw rules and procedures. As demonstrated by AT&T, MCI and Sprint, the three leading U.S. carriers that negotiate U.S. international call termination arrangements with foreign carriers, dominant foreign carriers continue to use actual and threatened circuit or service disruption to coerce increases in termination rates. The U.S. international carriers, which are the only U.S. carriers to file comments in response to the Notice, underscore the continued importance of the Commission's anti-whipsaw safeguards in preventing harm to the U.S. international market, and support the adoption of additional and more expedited procedures to address actual and threatened circuit blocking activities.

The continuing foreign carrier pressures to raise termination rates are demonstrated by some foreign commenters. CANTO, which represents foreign carriers from many countries where termination rates exceed cost-based levels by significant margins, complains that Commission action to prevent foreign carriers from terminating or suspending services gives U.S. carriers "unfair negotiating leverage" in opposing foreign carrier efforts to increase rates. Similarly, Cable & Wireless, the incumbent provider in Jamaica, contends that foreign carriers are entitled to block circuits to force U.S. consumers making international calls to pay highly discriminatory additional subsidies that raise termination rates to more than 15 cents for over 50 per cent of AT&T's traffic to Jamaica.

The Commission's longstanding commitment to ensuring that U.S. carriers are not unfairly disadvantaged in their negotiations with foreign carriers has allowed U.S. carriers to

resist such pressures to raise rates. These and other pro-competitive Commission policies have allowed U.S. carriers to obtain reductions in termination rates that have been passed through in full to U.S. consumers – contrary to the baseless claims repeated here by some foreign commenters that this has not occurred.

AT&T and other U.S. carriers support the adoption of additional and more expedited procedures for anti-whipsaw relief, which is the subject of many of the questions asked by the Notice, to help prevent any reversal of this recent progress toward more cost-based termination rates. In particular, as shown by AT&T, the Commission should define broadly the scope of whipsaw conduct that is addressed by its rules and procedures, should provide procedures allowing expedited relief in response to foreign carrier threats of circuit disruption to achieve rate increases or other anticompetitive changes in the terms and conditions of operating agreements, and should prohibit the payment of increased rates when it finds that a foreign carrier has made such a threat. Such action would assist U.S. carriers to resist foreign pressures to raise termination rates on both fixed and mobile networks and help ensure that U.S. consumers continue to enjoy competitive pricing for international calls.

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AT&T Corp. ("AT&T") hereby submits its Reply Comments in response to the Notice of Inquiry on modifying the Commission's procedures to prevent harm to U.S. competition from the effects of "whipsaw" conduct by foreign carriers.¹

I. U.S. CARRIERS AFFIRM THAT WHIPSAW ACTIONS BY DOMINANT FOREIGN CARRIERS HARM THE U.S. MARKET AND REQUIRE ADDITIONAL COMMISSION MEASURES.

There is strong U.S. international carrier support for the expansion of the Commission's rules and procedures to provide additional measures to address whipsaw actions by foreign carriers. The comments by AT&T, MCI and Sprint, the three leading U.S. carriers negotiating international termination arrangements with foreign carriers, emphasize that whipsaw conduct by dominant foreign carriers continues to threaten major competitive harm to the U.S. market, and

¹ FCC 05-152 (rel. Aug. 15, 2005) ("Notice").

support the adoption of clarifications and modifications in the Commission's anti-whipsaw rules and procedures to help ensure that U.S. carriers may negotiate with these foreign carriers on an equal basis.

1. Competition in the Global Market Has Not Removed the Need for Commission Safeguards Against Whipsaw Conduct.

The U.S. international carriers affirm that the Commission's anti-whipsaw rules continue to provide an important safeguard in the U.S. international market. The absence of sufficient competition in the large majority of foreign countries, and the continued market power of former incumbent carriers in those countries, show the inaccuracy of the claim by CANTO (p. 6) that U.S. carriers can avoid unreasonable rate increases simply by "choos[ing] not to deal" with a whipsawing foreign correspondent. As described by AT&T (p. 3) and MCI (p. 2), increased global competition has not removed the ability of foreign dominant carriers to use their control of the foreign end of U.S. international routes to whipsaw competitive U.S. carriers, and the Malaysian regulator (p. 1) expresses the same concern. Additionally, non-dominant foreign carriers may exercise similar foreign-end control to harm U.S. competition through concerted action or co-ordination with a foreign government.²

The Commission made similar findings in the 2004 *ISP Reform Order* and stated its continuing concern that "foreign carriers on routes where we have allowed greater flexibility can continue to exercise market power for the purpose of raising termination rates above competitive levels."³ For this very reason, the Commission established new safeguards against the abuse of

² AT&T at 5; Sprint at 1.

³ *ISP Reform Order*, ¶ 25. See also, *id.*, ¶ 40 (competitive safeguards remain necessary to protect U.S. customers because "global markets are not fully competitive and the independence and

foreign market power in that order at the same time that it removed the International Settlements Policy from many U.S. international routes.

Other developments in the U.S. international market also highlight the need for expanded whipsaw relief. AT&T (p. 3) shows that the increasing volumes of U.S. international calls being terminated on foreign mobile networks provide significant new incentives and opportunities for foreign carriers to engage in this misconduct to seek to recapture lost U.S. consumer subsidies. In an era when termination rates on fixed networks have declined on many routes, foreign carriers also may engage in such conduct in an effort to halt or reverse these trends. MCI (p. 11) and Sprint (p. 2) note the highly interconnected nature of the international market, the growth of the international wholesale market and the speed with which large wholesale traffic volumes may now move among carriers, which require Commission procedures allowing a rapid response to whipsaw threats and actions.

The U.S. comments in this proceeding thus reflect the further U.S. international carrier experience in negotiating commercial arrangements since the conclusion of the *ISP Reform* proceeding. These U.S. carriers show that the continued ability of foreign dominant carriers to disrupt commercial negotiations, and their continued incentives to engage in this conduct, require additional and more expedited Commission anti-whipsaw procedures, particularly to address threats of circuit disruption.

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effectiveness of foreign regulators varies”).

2. Whipsaw Conduct Continues to Cause Significant U.S. Market Harm.

U.S. carriers also emphasize that whipsawing causes significant harm in to U.S. consumers, by disrupting services to customers, replacing freely negotiated terms and conditions with those resulting from the exercise of market power, forcing unreasonable rate increases, and impeding progress towards more cost-based rates. AT&T at 1-2; MCI at 5-6; Sprint at 2. As noted by MCI (p. 6), significant numbers of customers may be affected before traffic may be re-routed via other carriers. Furthermore, in AT&T's experience, re-routed traffic may still entail higher costs and lower call quality.

Some foreign commenters are similarly concerned by the harmful effects of this conduct. The Jamaican Competitive Telecommunications Association notes (pp. 2-3) that consumers and other carriers at the foreign end are also adversely affected when foreign dominant carriers block circuits. The national regulator for Malaysia, where both international termination rates on both fixed and mobile networks are under 3 cents, concurs (p. 2) that "[a]ctions of carriers involved in circuit blocking purely with a view to achieve rate increases or changes to the terms and conditions of terminating agreements, are generally unacceptable."⁴

However, other foreign commenters seek to defend such conduct, as described below, and their comments provide a vivid demonstration of the pressures to increase termination rates that U.S. carriers frequently face in their negotiations with foreign carriers. These foreign commenters further underscore the need for expanded anti-whipsaw measures to assist U.S.

⁴ The Malaysian regulator also underscores (p. 4) the importance of Commission action to address the problem of "unreasonably high mobile termination rates charged by foreign carriers in certain countries" and the need for "appropriate [FCC] measures to align them towards cost." Pressures to increase foreign mobile termination rates, as noted above, are an increasing cause of whipsaw conduct.

carriers in resisting these pressures and to help ensure that U.S. consumers continue to enjoy competitive pricing for international calls.

II. MODIFICATIONS AND CLARIFICATIONS IN COMMISSION ANTI-WHIPSAB RULES AND POLICIES WOULD ASSIST U.S. CARRIERS IN ADDRESSING CIRCUIT DISRUPTIONS AND THREATS.

To address the many potential ways in which dominant foreign carriers may disrupt commercial negotiations in support of their efforts to raise termination rates, U.S. carriers support a broad definition of the types of service-affecting action that may be used for such coercion or retaliation, the use of more expedited procedures in response to actual and threatened circuit disruption, and the use of additional remedies.

1. The Commission's Rules and Procedures Should Recognize the Broad Scope of Service-Affecting Action That May Require Anti-Whipsaw Remedies.

Both AT&T (pp. 5-9) and MCI (p. 7) emphasize that the Commission's anti-whipsaw rules and remedies should address all the potential ways in which dominant foreign carriers may seek to coerce or retaliate against U.S. carriers, whether such foreign carrier action targets one type of traffic, one portion of the network or all traffic on an international route. The Commission has found that dominant foreign carriers whipsaw U.S. carriers and harm the U.S. market by blocking all calling, as occurred on the U.S.-Argentina and U.S.-Philippines routes,⁵ by blocking one type of traffic on a route,⁶ or by engaging in discriminatory behavior affecting a

⁵ See *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief*, 19 FCC Rcd. 9993 (2004) ("*Philippines Order On Review*"); *AT&T Corp., Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina*, 11 FCC Rcd. 18,014 (1996) ("*Argentina Order*").

⁶ See *AT&T Corp. Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief*, 18 FCC Rcd. 3519, ¶ 12 (2003) (dismissing claims that blocking limited to "offnet" traffic destined for other carriers did not constitute whipsaw activity). See

particular service.⁷ Accordingly, the Commission's anti-whipsaw rules and procedures should continue to protect U.S. consumers against actual or threatened disruption of a particular service in which a foreign carrier may wish to increase rates, such as home country direct services, inbound 800 services, or calls to foreign mobile networks.

AT&T and MCI are concerned that U.S. international traffic terminating on foreign mobile networks is a particular subset of traffic that may be subject to blocking actions to leverage higher rates. Two recent instances of circuit disruption cited by the Notice (§ 4) were blockages of U.S. calls to foreign mobile networks in Ecuador and Nicaragua, and the increasing volumes of U.S. international calls terminating on foreign mobile networks may lead to further foreign carrier blocking actions directed against this traffic in the future. To help prevent foreign carriers from engaging in this conduct to increase foreign mobile termination rates paid by U.S. carriers, the Commission's anti-whipsaw rules and remedies should continue to apply in such circumstances.

These U.S. carriers also underscore that the Commission's anti-whipsaw rules should apply to the wide range of other ways in which foreign carriers can use their market power to disadvantage U.S. carriers in termination rate negotiations, such as degrading service quality. AT&T at 7-9; MCI at 7-8. In addition, as described by AT&T, unreasonable contract terminations by dominant foreign carriers have the same adverse effect as the blockage of traffic

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also, Philippines Order On Review, §§ 12, 17.

⁷ *AT&T Corp., MCI International, Inc.*, 12 FCC Rcd. 13,378 (1997) (foreign carrier attempted to whipsaw U.S. carriers by engaging in discriminatory behavior in negotiations for Home Country Direct services).

and should also be addressed by these rules and procedures. Otherwise, foreign dominant carriers will retaliate against a U.S. carrier that resists rate increases or presses for lower rates simply by terminating the U.S. carrier's operating agreement.

2. Expedited Procedures Should Apply to Whipsaw Complaints and Requests for Interim Relief.

Another significant U.S. carrier concern is the need for more expedited Commission procedures. AT&T (p. 11-15), MCI (pp. 8-10) and Sprint (pp. 3-4) highlight the importance of swift action in response to actual and threatened circuit disruption. AT&T and MCI support the approach suggested by the Notice (§ 9) of adopting a shorter pleading cycle of five days for comments and two days for replies for complaints that allege circuit disruption. Sprint (p. 3) urges that immediate relief should be available on an *ex parte* basis where blocking has occurred, and AT&T shares this concern.

The U.S. carriers also advocate the use of expedited interim competitive safeguard measures when foreign carriers threaten U.S. carriers with circuit disruption and blockages. AT&T fully supports this approach, but also hopes that the Commission will continue to follow its existing practice of directly contacting the foreign regulator as early as possible to emphasize the possible consequences of the foreign carrier action. This practice of intervening directly with foreign regulators has had successful results in the past and continues to offer a way to resolve disputes expeditiously in the future. AT&T at 13-14.

AT&T also believes that the Commission should allow disputes to be resolved commercially wherever possible. Accordingly, AT&T does not support the automatic use of interim measures. Instead, the Commission should require a written notification by a U.S. carrier with a request for the adoption of such measures. AT&T at 14-15. AT&T also supports the use

of notice and comment procedures in these proceedings but recognizes that circumstances may not allow this where foreign carrier threats provide little advance notice of the threatened disruption.⁸ The use of expedited and *ex parte* procedures is certainly consistent with due process requirements, contrary to the claims by CANTO (p. 10) and C&W (p. 9). The Commission has previously found that foreign carriers are not entitled to comment in whipsaw enforcement proceedings, and that the proceeding establishing the relevant enforcement policy provides more than adequate notice.⁹ AT&T at 15.

The required showing in such a proceeding should be a credible threat of network disruption by a dominant foreign carrier to achieve a rate increase. AT&T at 15; Sprint at 3.¹⁰ The use of such a threat to obtain other anticompetitive changes in terms and conditions of termination agreements should also support such action. The Commission should allow the existence of a credible threat to be established either by documentary evidence or by affidavit. AT&T at 13; Sprint at 4. U.S. carrier negotiations may be disrupted by circuit disruption threats that are conveyed orally no less than where they are made through written notification. As noted by MCI (p. 9, n.26), “smoking gun” evidence is frequently not available.

When a U.S. carriers establishes the existence of a credible threat of network disruption to achieve a rate increase or other significant change in a term or condition in such a proceeding,

⁸ MCI and Sprint indicate that all such action should be on an *ex parte* basis.

⁹ *Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Peru*, 14 FCC Rcd. 8318, ¶ 25 (1999); *Argentina Order*, ¶ 23 (foreign carrier “had notice of the rulemaking underlying our ISP, and was therefore on notice the discriminatory practices contravening the ISP would be subject to enforcement action”).

¹⁰ As noted by Sprint (p. 3), such a showing will also usually be consistent with the requirements for injunctive relief under *Virginia Jobbers v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958).

the Commission should apply the same presumption of harm to the public interest that it applies when U.S. carriers show they have suffered circuit blockage and disruption in conjunction with allegations of anticompetitive behavior, or whipsawing. AT&T at 16. The Commission has previously found that blocking circuits “as opposed to resolving disagreements through negotiations, is unlikely ever appropriate or justified in the public interest.”¹¹

3. The Commission Should Use Tailored Remedies and Should Adopt Orders to Stop Increased Payments to Address Circuit Disruption Threats.

AT&T agrees with the preference expressed by MCI (p. 10) for tailored remedies in addressing whipsaw conduct and believes that such remedies are particularly important in addressing threatened circuit or service disruption. When foreign carriers make such threats in an effort to raise rates, the purpose of interim relief should be to remove the threat while resisting the demanded rate increase and maintaining open circuits and continued services on the international route. AT&T at 17.

Moreover, as shown by AT&T (*id.*), the most effective relief to achieve these desired objectives in response to foreign carrier threats of circuit disruption is to prohibit the payment of increased rates. Such an order will prevent the foreign carrier from obtaining any benefit by taking the threatened action, but will still allow continued payments at previously negotiated levels to encourage both continued services on the route and the restoration of normal commercial relations once the foreign carrier ceases its coercive behavior. Contrary to the claim by CANTO (p. 6), there is nothing “unfair” about imposing such a remedy where a dominant foreign carrier attempts to coerce increased payments. The only affected revenues are the

¹¹ *ISP Reform Order*, ¶ 44.

increases the foreign carrier attempts to obtain by threatening to disrupt circuits.

As AT&T described (p. 18), full stop payment orders, and other remedies that would reduce existing payments, should not be necessary to address threats of circuit disruption and may even be counterproductive in these circumstances. Remedies that would reduce existing payments are likely to be viewed as overbroad where the foreign carrier has taken no action to affect existing services.

There are a wide range of potential remedies available for use where foreign carriers take action to disrupt services, including full and partial stop payment orders, full and partial re-imposition of the ISP, and increases in inbound rates, as indicated by the Notice (¶ 11 & n.35).¹² MCI (p. 13) suggests that U.S. carriers and cable landing license holders could be prohibited from terminating inbound traffic from foreign carriers engaging in or threatening whipsawing, and Sprint (p. 5) suggests that there could be a requirement for “‘no-payment’ for a specified period.” The severity of these suggested approaches demonstrates the serious concern with which U.S. carriers view foreign carrier efforts to use their market power to disrupt commercial negotiations in order to force the payment of higher rates for both fixed and mobile-terminated traffic.

AT&T believes that the Commission should determine the specific remedy to be used in each proceeding in light of the relevant facts and in close consultation with the affected U.S. carriers. AT&T also shares the concern expressed by MCI (p. 14) regarding the use of remedies that may prove counter-productive and result in further harm to U.S. carriers and consumers. In this regard, AT&T (pp. 18-19) and Sprint (p. 6) are concerned that the full re-imposition of the

¹² See also, *ISP Reform Order*, ¶ 47.

ISP is overly burdensome for U.S. carriers and generally does not provide an effective whipsaw remedy.

AT&T (p. 19) and MCI (p. 13) both support the use of required increases in inbound rates in response to unreasonable increases in outbound rates. This approach would be very similar to the symmetrical rate requirement of the ISP, which reduces whipsaw incentives, and mitigates the harmful effects on the U.S. market of unreasonably high foreign termination rates, by requiring foreign carriers to pay U.S. carriers the same rates for inbound calls that they charge U.S. carriers for outbound calls. This approach would be less burdensome for U.S. carriers than the full re-imposition of the ISP and is also supported by the Jamaican Competitive Telecommunications Association (p. 3). However, as noted by AT&T, because U.S.-outbound traffic volumes greatly exceed U.S.-inbound traffic volumes on most routes, in most instances this approach would provide only a partial remedy and should be used in conjunction with other measures.

Some foreign commenters incorrectly contend that the Commission is precluded by domestic law or the WTO Agreement from taking action in response to foreign carrier efforts to coerce agreement to rate increases by engaging in whipsaw actions and that it should rely on WTO dispute resolution procedures.¹³ The D.C. Circuit has affirmed that the Commission has “ample” statutory authority to address actual or potential whipsaw behavior by applying necessary safeguard measures to any route.¹⁴ The safeguard measures described above are well

¹³ See CANTO at 3; C&W at 10-12.

¹⁴ *Atlantic Tele-Network, Inc. v. FCC*, 59 F. 3d 1384, 1389 (D.C. Cir. 1995) (“even if the FCC had no formal policy of proportionate return at the time it imposed the condition on ATN’s authorization, it had ample authority to require it on an *ad hoc* basis”).

within the scope of those traditionally applied by the Commission under its anti-whipsaw policies and the ISP.¹⁵ Indeed, the Commission has consistently made clear that it may take remedial action on any route where the ISP is removed to prevent harm to the U.S. market.¹⁶

Additionally, the Commission has emphasized that “the [WTO] Reference Paper explicitly imposes an obligation on WTO Members which adopted it to prohibit anticompetitive behavior” and “does not limit measures against anticompetitive conduct to domestic carriers.”¹⁷ The Commission also has affirmed that it will enforce its regulations to prevent harm to the U.S. market regardless of any remedy that may also be available under the WTO Agreement.¹⁸

III. FOREIGN COMMENTERS FAIL TO JUSTIFY THE USE OF CIRCUIT AND SERVICE DISRUPTION TO OBTAIN INCREASES IN TERMINATION RATES.

The need for strong Commission measures to combat whipsawing to prevent dominant foreign carriers from using this tactic to obtain increases in foreign termination rates is also shown by the comments by several dominant foreign carriers asking the Commission *not* to prevent them from seeking to raise rates in this way. To avoid this harm to the U.S. market, as

¹⁵ See, e.g., *Argentina Order* (applying stop payment order in response to foreign carrier whipsaw conduct); *Regulation of International Accounting Rates*, 6 FCC Rcd. 3552, n. 30 (1991) (Commission “would expect to deny” ISP waiver requests for “non-cost-based increases in, or surcharges to, the accounting rate, or less than 50 percent shares for U.S. carriers”).

¹⁶ *1998 Biennial Regulatory Review, Reform of the International Settlements Policy and Associated Filing Requirements*, 14 FCC Rcd. 7963, ¶ 30 (1999) (Commission may take “appropriate remedial action” where “a foreign carrier that otherwise might appear to lack market power might possess some ability to set rates for terminating traffic due to government policies or collusive behavior in the foreign market”); *ISP Reform Order*, ¶ 47 (Commission remedies to prevent “real or potential harm to the U.S. public interest” on non-ISP routes may include “a variety of remedies” including re-imposition of the ISP’s requirements and stop payment orders).

¹⁷ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd. 23891, ¶ 372 (1997).

¹⁸ *Id.*, ¶ 359 (“We have a separate statutory obligation to regulate and enforce our rules that

shown by AT&T (pp. 9-10), Commission anti-whipsaw rules and remedies should be available to address all forms of this behavior, regardless of the purported basis for the underlying rate increase. There also is no basis to the claims by these foreign carriers that U.S. carriers fail to pass through reductions in termination rates.

1. CANTO Fails to Justify Circuit Blocking By Citing the Hypothetical Possibility that Cost-Based Rates May be Subject to Increases in Cost.

CANTO (p. 2) wrongly contends that its members – which include dominant foreign carriers in at least sixteen countries¹⁹ – legitimately may engage in “service terminations and/or suspensions” where U.S. carriers do not agree to raise rates. Longstanding Commission precedent makes clear that foreign carriers may not obtain increased U.S. consumer subsidies by using their control of the foreign end of U.S. international routes to force U.S. carriers to comply with their demands. *See* AT&T at 1-2. The Commission has found that blockage or disruption of U.S. carrier networks by foreign carriers “is *unlikely ever* appropriate or justified in the public interest.”²⁰

CANTO (p. 7) fails to justify rate increases by referring to “the *possibility* that, at some *future date*” termination rates may be “substantially cost-based” and subject to “increases in cost.”²¹ The termination rates charged by many CANTO members continue to exceed cost-based

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cannot be stayed while the Executive Branch seeks relief in an international tribunal.”).

¹⁹ Compare, <http://www.canto.org/memberlist.htm>, with Public Notice, DA 04-1548, May 28, 2004, *The International Bureau Revises and Reissues the Commission’s List of Foreign Telecommunications Carriers that Are Presumed to Possess Market Power in Foreign Telecommunications Markets*.

²⁰ *ISP Reform Order*, ¶ 45 (emphasis added).

²¹ *Id.*, ¶ 49 (emphasis added).

levels by significant margins.²² CANTO also does not indicate when those rates are likely to be reduced to cost-based levels. More relevant here, therefore, is the Commission's finding in the *ISP Reform Order* that "upward movement in rates that are not cost-based is not consistent with the development of competition in the U.S. market."²³ Moreover, the Commission also determined that "because there is no basis to believe that the underlying incremental costs are rising, increases in rates likely indicate either the absence or thwarting of effective market forces, or abuse of market power."²⁴

CANTO's further claim (pp. 3-4) that foreign international carriers are in danger of being "squeezed" by higher domestic termination rates paid to fixed or mobile carriers in the foreign country fails to recognize the affiliations that frequently exist among these foreign carriers. Indeed, foreign international carriers frequently either are, or are affiliated with, the largest foreign domestic fixed and mobile carriers in their countries.²⁵ In such instances, these purported "costs" are nothing more than right-pocket to left-pocket transactions. The high continuing levels of the international termination rates charged in most Caribbean countries, which provide very generous margins above underlying costs, casts further doubt on the validity of CANTO's

²² For example, CANTO member countries frequently charge AT&T rates of \$0.10 or more to terminate calls on fixed networks, which exceed the cost of such termination by at least 150 percent. *See* Letter and attachments dated February 5, 2004 to Marlene Dortch, FCC, from Douglas Schoenberger, AT&T, IB Docket No. 02-324 (showing conservative cost ceiling based on foreign carrier tariffs and charges of \$0.04 for U.S. international call termination on fixed networks).

²³ *ISP Reform Order*, ¶ 48.

²⁴ *Id.*

²⁵ *See, e.g., The Effect of Foreign Mobile Termination Rates on U.S. Customers*, IB Docket No. 04-398, Comments of AT&T Corp., filed Jan. 14, 2005, Attachment A (showing that foreign international carriers with market power have mobile carrier affiliates in 92 of 110 countries

unsupported assertion (p. 5) that foreign carriers are likely to go “out of business” if the Commission takes any action to limit U.S. carrier payments when the foreign carrier threatens to disrupt circuits.

2. Jamaican Carriers Fail to Justify Circuit Blocking to Force the Payment of Discriminatory “Universal Service” Subsidies.

A specific example of the ways in which foreign countries seek to maintain unjustified U.S. consumer subsidies is provided by Jamaica, which requires U.S. and other non-Jamaican carriers terminating international calls in Jamaica to pay a “levy” of 3 cents per minute for fixed-terminated calls and 2 cents per minute for mobile-terminated calls, purportedly for “universal service” purposes, on top of Jamaican carriers’ other termination rates for these calls.²⁶ No similar surcharges are imposed on any Jamaican domestic or outbound international calls.²⁷

In announcing the levy, the Jamaican Minister of Commerce, Science and Technology

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examined for this analysis).

²⁶ U.S. carriers were already paying significant subsidies to Jamaica before these further charges were imposed. Over 50 percent of AT&T’s international traffic to Jamaica is terminated on mobile networks at rates of over 15 cents. Thus, even without these additional charges, Jamaica’s charges for this traffic already far exceeded even a conservative cost-ceiling for mobile-terminated calls in Jamaica. See Letter and attachments dated February 5, 2004 to Marlene Dortch, FCC, from Douglas Schoenberger, AT&T, IB Docket No. 02-324 (showing cost ceiling for mobile-terminated calls in Jamaica of \$0.0465, based on Jamaican carriers’ domestic tariffs and charges for the same termination functions).

²⁷ C&W (p. 10, n.21) fails to show otherwise by citing certain “local taxes imposed on domestic calls (but not international calls) in Jamaica,” which are currently at the level of 3.5 percent. In fact, Jamaican law places an upper limit of “five per cent of the projected eligible revenues derived by licensees from provision of the relevant services” on universal service obligations recommended by the regulator. See Jamaica Telecommunications Act 2000, Sect. 42(2)(a). In contrast, the levy on international-inbound fixed-terminated call revenues is greater than 100 percent and the levy on international-inbound mobile-terminated call revenues is approximately 15 percent.

“emphasized that the levy would not be a charge on the Jamaican consumer, as it would only be applied to incoming international calls.”²⁸ Jamaica’s requirements that the levy is “payable by *third parties* [i.e., carriers sending traffic to Jamaica]” and is “in addition to” cost-based rates further underscore the highly discriminatory and non-cost-based nature of these charges.²⁹

The Commission long ago made clear in the *Benchmarks Order* that U.S. consumers should not be required to pay discriminatory subsidies of this type on their international calls. The Commission expressly rejected claims “that foreign termination services from certain countries should be required to finance a disproportionate share of network costs,” and refused to revise the benchmarks methodology “to take into account discriminatory local access charges or universal service subsidies aimed solely or disproportionately at international termination services.”³⁰ The Commission further emphasized that “universal service subsidies must be nondiscriminatory and transparent.”³¹

Neither the comments by the Jamaican Ministry nor those by C&W, Jamaica’s dominant fixed carrier, or Digicel, its largest mobile carrier, attempt to justify why international calls from U.S. and other non-Jamaican consumers should be required to provide the only subsidy support for the provision of broadband Internet access to schools and libraries in Jamaica, or to support this non-basic service at all. In contrast, the U.S. universal service fund is funded by U.S.

²⁸ Government of Jamaica, Ministry of Commerce, Science and Technology, News Stories, *Government Imposes Levy on Incoming International Calls*, http://www.mct.gov.jm/call_levy.htm.

²⁹ C&W at 4 & Ex. 1 at 2, Ministerial Order, Sect. 5 (emphasis added).

³⁰ *International Settlement Rates*, 12 FCC Rcd. 19,806, ¶¶ 86-87 (1997) (“*Benchmarks Order*”).

³¹ *Id.*, ¶ 148.

domestic end-user revenues.³² Even other Jamaican carriers oppose this subsidy requirement on inbound international calls. The Jamaican Competitive Telecommunications Association (p. 2) “take[s] issue with [international termination rates] being singled out for a specific tax” and questions “the legitimacy of using such a narrow product ([international termination rates]) to fund USO and domestic network expansion.”³³

The Commission and U.S. carriers should not be required to “respect” such rate increases, as requested by C&W (p. 10), and threats or actual circuit disruption to enforce such increases are not exempt from the Commission’s anti-whipsaw rules and procedures. As described by AT&T (p. 10), such conduct has the same adverse effects in the U.S. market as other forms of whipsawing, by forcing above-cost and unjustified rate increases on U.S. consumers.³⁴

Both the Commission and the Executive Branch made clear in the *ISP Reform* proceeding that Commission intervention may be necessary where foreign governments mandate rate increases. NTIA requested “the automatic examination of a route where a foreign government

³² See 47 C.F.R. Sect. 54.709(a)(1).

³³ In fact, the Jamaican Minister of Commerce, Science and Technology has reported that “Jamaica has now achieved its universal service objectives in terms of voice telephony,” with “over 80%” tele-density in 2003, up from 30 percent in 2000, and that infrastructure investment has “surpassed by far, the US half a billion dollar mark.” See Government of Jamaica, Ministry of Commerce, Science and Technology, News Stories, *Jamaica Has Achieved Universal Service Objectives in Voice Telephony*, <http://www.mct.gov.jm/telephony.htm>.

³⁴ The comments indicate that the Jamaican carriers invited the intervention of the Ministry of Commerce, Science and Technology in Jamaica and agreed to some of the measures that they now put forward as justification for their actions in blocking U.S. carrier circuits. The Jamaican Ministry states (p. 4) (emphasis added) that “the Jamaican carriers first brought the issue of a potential service disruption to the attention of the Ministry, *to invite his intervention.*” Furthermore, the Annex, issued on May 31, 2005, states that “the Minister and the three Applicants [Jamaican domestic network operators] *agreed* to resolve the issues raised in the Application for Reconsideration *on the terms set out in this Annex.*” C&W, Ex. 1, Annex to Ministerial Order, Jamaica Gazette Supplement, at 202 (emphasis added).

mandates a price floor that increases rates above competitively negotiated levels, regardless of whether the increase is below current benchmarks.”³⁵ In response, the Commission affirmed that “[c]onsistent with NTIA’s concerns,” its competitive safeguards would “address anticompetitive harm against U.S. competition and U.S. customers, and the rebuttable presumption of harm in the event of retaliation against U.S. carriers [would] expedite such findings.”³⁶ In accordance with this approach, the Commission’s anti-whipsaw rules and procedures should continue to apply to threatened or actual circuit disruption in support of all efforts to raise rates above competitively-negotiated levels, regardless of the purported basis for the rate increase.

3. Claims That U.S. Carriers Fail to Pass Through Reductions in Termination Rates Have No Basis in Fact.

Foreign carrier claims that U.S. carriers fail to reflect lower termination rates in their end-user prices are refuted by the U.S. price reductions of 47 cents per minute for the period 1997 through 2003, which greatly exceeded the reductions in foreign termination rates in this same period of 26 cents in average rates and 18 cents in net rates. AT&T at 19-21. This is exactly the expected result in the highly competitive U.S. market, as the Commission has repeatedly emphasized, because competitive market pressures ensure that prices follow costs.³⁷

Similarly, AT&T’s average U.S. revenue per minute for calls to Jamaica fell from \$0.86

³⁵ Letter dated Aug. 3, 2003 from Nancy J. Victory, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to the Honorable Michael K. Powell, Chairman, FCC, IB Docket No. 02-324, at 2.

³⁶ *ISP Reform Order*, ¶ 45, n.115. *See also, id.*, ¶ 46 (noting, but not adopting, the claim that “where a foreign government has enacted a rate increase,” the Commission should focus on the procedures used by a foreign regulator, and agreeing with other commenters that “we should establish or maintain competitive safeguards as a precautionary measure”).

³⁷ *See Benchmarks Order*, ¶ 270; *ISP Reform Order*, ¶ 72.

to \$0.22 between 2000 and 2004, a reduction of 64 cents, while AT&T's average termination rate for these calls fell from \$0.48 to \$0.11 in this same period, a reduction of 37 cents, and AT&T's net termination rate on this route was reduced by 26 cents.³⁸ Thus, AT&T's U.S. price reductions on the U.S.-Jamaica route between 2000 and 2004 were far greater than the reductions in the termination rates AT&T was charged by Jamaican carriers in this period, and greater still than the reduction in AT&T's net rate on this route.³⁹ This demonstrates not only that AT&T's U.S. customers received the full benefit of these lower termination rates but also that AT&T's price reductions on this route far exceeded the reductions in AT&T's termination costs.

The claims to the contrary by several foreign commenters in this proceeding appear to reflect a misreading of the relevant data, or the erroneous assumption that prices should show the same percentage reduction as settlement costs, which fails to recognize that settlements are not the only cost component of international calls.⁴⁰ As noted by MCI (p. 15 & n.32) and Sprint (p. 7), such claims also fail to take account of the low rates that are often paid by both business customers and by consumers making international calls by using pre-paid cards. It is also noteworthy that, according to the Jamaican Association of Competitive Telecommunications Association (p. 4), rates for calls from Jamaica to the United States have fallen to a lesser extent than those for U.S. calls to Jamaica.

³⁸ See FCC 43.61 2000 Report, Table A12 (data for AT&T & Concert Global Networks USA LLC). The 2004 data cited here is based on AT&T's preliminary 43.61 report for 2004.

³⁹ See *Benchmarks Order*, ¶ 274 (U.S. carrier settlement cost reductions are shown by the net rate).

⁴⁰ Just as a ten percent reduction in the price of steel does not result in a ten percent reduction in the price of an automobile, reductions in settlement costs do not bring the same percentage reductions in international calling prices.

CONCLUSION

For the reasons set forth in AT&T's comments and above, the Commission should adopt additional measures to discourage foreign carriers from engaging in threats of and actual circuit disruption in support of their efforts to raise rates to U.S. carriers. In particular, the Commission should define broadly the scope of whipsaw conduct that is addressed by its rules and procedures, should provide procedures allowing expedited relief in response to foreign carrier threats of circuit disruption to achieve rate increases or other anticompetitive changes in the terms and conditions of operating agreements, and should prohibit the payment of increased rates when it finds that a foreign carrier has made such a threat.

Respectfully submitted,

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Dated: October 27, 2005.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October 2005, I caused true and correct copies of the foregoing Reply Comments of AT&T Corp. to be served on all parties by electronic mail to their addresses listed on the attached service list.

Dated: October 27, 2005

/s/ Hagi Asfaw _____
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